Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1557

WOODROW YOKUM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

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No. .....

WOODROW YOKUM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

Petitioner, Woodrow Yokum, respectfully prays that a Writ of Certiorari issue to review the opinion and judgment of the Court of Claims of the United States in this proceeding.

OPINIONS BELOW

The opinion of the Court of Claims of the United States, dated November 21, 1975, has not been officially reported and is attached in Appendix A 1-5. The subsequent Order of the Court of Claims of the United States denying Petitioner's Motion for rehearing appears in Appendix A-6.

JURISDICTION

The judgment of the Court of Claims of the United States was entered on November 21, 1975. Petitioner's

Motion for rehearing was denied on January 30, 1976. This Court's jurisdiction is invoked under 28 U.S.C. § 1255 (1) (1970).

QUESTIONS PRESENTED

1. Did the Statute of Limitations begin to run in 1967 when (a) Petitioner's property was seized by Respondent, not with a claim of right but with a stated intention to return the property to Petitioner when its use as "mere evidence" in criminal proceedings had terminated; and (b) Respondent first became under a duty to return the property in 1970 when the criminal proceeding terminated.

2. Did new promises by Respondent in 1970 thru 1973, stating an intent to return the property to Petitioner, toll the Statute of Limitations?

STATUTES

The pertinent Statute in this case relating to the Limitation of Civil Action is 28 U.S.C. § 2501 (1975).

STATEMENT OF THE CASE

1. PETITIONER'S PROPERTY WAS SEIZED FOR USE AS "EVIDENCE" BUT IT WAS NEVER USED IN ANY CRIMINAL PROSECUTION.

During the months of February and March, 1967, pursuant to a series of search warrants issued by the United States District Court for the Northern District of West Virginia, the Respondent seized and impounded a large quantity of personal property which is the subject matter of this suit. The property consisted of automobiles, trailers, trucks, electronic and radio equipment, and other similar property.

The search warrants alleged that the "property was embezzled, stolen, purloined and converted from the said United States of America and then concealed and retained with intent to convert said (property) for personal use and gain, in violation of Title 18, Section 641, United States Code".

Following the seizure of the property in issue, two separate federal actions were instituted against Petitioner. The first, commenced in the Northern District of West Virginia, Civil Action 67-91-E, resulted in Petitioner's conviction on Six (6) counts of violating 18 U.S.C. § 2312 (Interstate Transportation of Stolen Property in Interstate Commerce), and Three (3) counts of violating 18 U.S.C. § 641 (Theft of Government Property). However, none of the property which is the subject of this claim was used in that or any other criminal action. The Judgment and Commitment Order was entered on August 5, 1968. On appeal, the Fourth Circuit reversed the District Court as to One (1) count but affirmed Petitioner's conviction as to the remaining counts.

The second criminal proceeding, commenced by indictment in the Eastern District of Virginia, was dismissed against Petitioner on July 9, 1970. Again none of the property which is the subject of this claim was used in that or any other criminal action.

2. MOTIONS FOR RETURN OF THE PROPERTY WERE DENIED BECAUSE OF POSSIBLE FURTHER USE THEREOF IN CRIMINAL PROCEEDINGS.

Petitioner prior to, during and subsequent to Criminal Action No. 67-91-E in the United States District Court

for the Northern District of West Virginia, moved for the return of the property. The Respondent resisted said motion and advised the United States District Court that all property was being "retained for use as evidence in further investigation and proceedings involving surplus property matters in other jurisdictions and that the Government was retaining the property to be used as evidence" (Appendix B-11 and B-17). On April 13, 1970, the Petitioner, Woodrow Yokum, by counsel, filed a Motion renewing his earlier Motions for return of the property. That Motion was dismissed by the United States District Court for the Northern District of West Virginia on May 29, 1970.

3. RESPONDENT'S STATEMENTS OF INTENTION TO RETURN PROPERTY TO PETITIONER.

The Respondent's intent to return to Petitioner the property which is the subject of this action is evidenced by its own statements, for example:

In the letter of September 29, 1971, the Government asked Attorney Bonn Brown to confer with Petitioner, Woodrow Yokum, concerning the "property acquired" by the Government and to advise the Government "relative to any claims the Yokum's may have to said property". (Appendix B-1).

In its letter of May 22, 1972, the Government stated as a fact that "this office has the duty to return the property to the party or parties rightfully entitled to possession". "From the time of the seizure to the present, all of said property has been impounded and preserved pending the outcome of the criminal proceedings and prior efforts to resolve the property dispute". (Emphasis Added). (Appendix B-2).

By letter of March 29, 1972, the Respondent again stated "we are willing to return those items of property which Mr. Yokum can demonstrate a clear and recognizable right of possession". (Appendix B-4).

The Respondent's letter of February 17, 1973, which was in reply to Petitioner's then Attorney Scherr's letter states "since it appears that this property belongs to the S.R.C. (State Road Commission of West Virginia) and C.A.P. (Civil Air Patrol) and yet those Two (2) agencies acknowledge no claim or right to this property, the Government must see what evidence or authority you have that gives Mr. Yokum the right to claim these items of property for his personal use", "the above remarks pertain to the items acquired in the names of S.R.C. and C.A.P. I understand that Mr. Yokum claims to have acquired other property from Davis and Elkins College . . ." (Appendix B-8).

This action was instituted on January 2, 1975.

REASONS FOR GRANTING THE WRIT

1. The Court below decided an important question of federal law which has not been, but should be, settled by this Court.

2. The Court below has decided a federal question in conflict with applicable decisions of this Court.

3. The Court below so far departed from the accepted cause of judicial proceedings as to call for an exercise of this Court's power of supervision.

Specifically the Court below has corrupted the established theory of the applicability of the Statute of Limitations.

ARGUMENT

POINT ONE

RESPONDENT FIRST CAME UNDER A DUTY TO RETURN THE PROPERTY ONLY IN 1970. IN ADDITION THE RESPONDENT THEREAFTER STATED AN INTENTION TO RETURN THE PROPERTY TO PETITIONER. ACCORDINGLY THE STATUTE OF LIMITATIONS COULD NOT BEGIN TO RUN UNTIL SUCH DUTY AND PROMISE HAD BEEN BREACHED.

A. IN GENERAL:

The Government had a right to retain the Petitioner's property temporarily for use as "mere evidence" in pending criminal prosecutions until such use had ceased. Accordingly, Petitioner had no right to obtain the property and no cause for the return thereof could arise until its use as "mere evidence" had terminated. Thus, there are Two important dates relative to when Petitioner's cause of action arose: (1) When Certiorari was denied in Criminal Action No. 67-91-E, April 6, 1970, 390 U. S. 1030; and (2) the date on which the criminal charges in the United States District Court for the Eastern District of Virginia were dismissed, July 9, 1970.

It is elementary that where ones property is seized as "evidence", there is a duty to return the same unless upon the conclusion of the criminal proceeding it is established that the property was originally obtained illegally.

The undisputed evidence shows that the property seized by the Respondent was seized with a stated intention to return the property to Petitioner when its use in the criminal proceedings has terminated. (See

the correspondence previously mentioned and found in Appendix B-2 thru B-19). Accordingly the Statute of Limitations could not begin to run until the promise to return the property had been breached.

B. THE RESPONDENT MAY RETAIN PROPERTY FOR TEMPORARY USE AS "EVIDENCE" IN A CRIMINAL PROCEEDING. DURING SUCH TEMPORARY USE THE STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN:

It is elementary that the Respondent may retain property for use as "evidence" in a Criminal proceeding, until such proceeding terminates. During that period the accused may not sue for its return. *Warden* v. *Hayden,* 387 U.S. 294 (1967). Specifically, types of property seized for use as "evidence" are not subject to return until the Criminal prosecution involved terminates, but are subject to return, thereafter if the property has not been shown to have been obtained illegally.

Such property includes business records seized by the Internal Revenue Service in the evasion investigations, *Vonder ahe* v. *Howland,* 508 F2d 364 (9th Cir. 1975); *Shaffer* v. *Wilson,* 383 F. Supp. 554 (D. Colo. 174); MacClean v. Trainor, 365 D. Supp. 695 (W.D. Pa. 1973); and clothes, for the purpose of identifying the suspect in various types of criminal prosecutions, *United States* v. *Edwards,* 415 U.S. 800 (1974); *Warden* v. *Hayden,* 387 U.S. 294 (1967); *Clarks* v. *Neil,* 427 F2d 1322 (6th Cir.), *cert. denied,* 401 U.S. 941 (1970); *Davis* v. *United States,* (409 F2d 1095 (5th Cir. 1969).

The seizure of money in cases involving violations of federal gambling statutes is analogous to the present case, in that possession of the property is not illegal itself (the property is not contraband and as admitted by

Respondent in this matter the property seized is "mere evidence"), but there is an issue as to how the defendant came into possession of the property. In *United States* v. *Erskine,* 248 F. Supp. 137 (D. Ore. 1975), the Court held that such money could be held as evidence to be used in a trial to determine the manner in which defendant obtained it. However, the Government may not retain possession of the money without showing that the property was acquired illegally. *United States* v. *Hanna,* 260 F. Supp. 430 (S.D. Fla. 1966). This case was reversed on appeal. 393 F.2d 700 (5th Cir. 1968). However, on rehearing, the Fifth Circuit, sitting enbanc, reversed the reversal, and affirmed the District Court's decision. Certiorari was denied. 394 U.S. 1015. The District Court there held that: "No evidence was presented which would indicate that the money was involved in any illegal business, therefore the defendants are entitled to return of this Property." 260 F. Supp. at 434. Thus, where the Government seeks to retain possession of the evidence, it has the burden of going forward in showing it to be the "fruits of the crime". This the Respondent never did in regards to this property.

Accordingly, Petitioner could not sue for the return of the property as long as it had a potential use as "evidence", that is, until the Criminal prosecutions terminated in 1970. Thus, no cause of action for its return could arise until 1970. See *Moline Plow Company* vs. *Webb,* 141 U.S. 616 (1891). Accordingly the Statute of Limitations does not begin to run until 1970.

C. THE GRANTING OF SUMMARY JUDGMENT WAS IMPROPER.

Arguing in the alternative, there was at least a question of fact as to whether the property seized by the Respon-

dent was seized with a promise or duty to return to Petitioner, after the criminal proceedings terminated in 1970. The granting of a Motion for Summary Judgment was thus improper. *First National Bank of Arizona* v. *Cities Service Co.,* 391 U.S. 253 (1968).

POINT TWO

RESPONDENT'S PROMISES IN 1970 THRU 1973 TO RETURN THE PROPERTY TOLLED THE STATUTE OF LIMITATIONS.

It is an elementary and general rule of law that a new promise to pay a debt or an unqualified acknowledgement of a debt from which a promise to pay may be implied, will take that case out of the Statute of Limitations. *Shepherd v. Thompson,* 122 U.S. 231, 30 Led 1156, 7 S Ct 1229; *Newell* v. *Nixon* (US) 4 Wall 572, 18 L Ed 305; *United States* v. *Calumet Steel Co.* (CA7) 74 F2d 429; *Blake* v. *Commercial Factors Corp.* 216 Ark 664, 226 SW2d 986. This rule applies whether the acknowledgment or new promise is made before or even after the debt is barred. It is not the mere acknowledgment of a subsisting indebtedness which removes the bar. Where a debt is admitted to be due, the law raises a promise to pay it. It is this new promise, either made in express terms or deduced from an acknowledgment, as a legal implication, which is to be regarded as reanimating the old promise, or as imparting vitality to the remedy, and thus enabling the creditor to recover upon his original contract. *Mattingly* v. *Boyd,* 20 How (US) 128, 15 L Ed 845. A new promise, made before a debt is barred by the Statute of Limitations, does not create a new and substantive contract, but merely evidences an existing liability and fixes a new date from which the statute runs. *Battle* v. *Demkovich,* 148 W.Va. 618, 136 SE2d 895.

In our case, as set forth in the statement of the case, Respondent made new promises in 1971, 1972, and 1973, to return the property. These promises tolled the Statute of Limitations.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

RICHARD W. CARDOT, *Esquire*
LAW OFFICE OF CARDOT & KENT
Attorneys at Law
P.O. Box 266
Elkins, West Virginia 26241

Counsel for Plaintiff

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 2-75

WOODROW YOKUM

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, SKELTON and BENNETT, *Judges*

ORDER

On January 2, 1975, plaintiff filed his petition herein to recover the sum of $400,000 alleged to be the reasonable value of property to which plaintiff claimed ownership and which was taken from him by the defendant during the months of February and March 1967. The case before the court on defendant's motion for summary judgment and plaintiff's opposition thereto. Upon consideration of the motions and briefs of the parties, plus the affidavits and documentary exhibits supporting defendant's motion, the court finds:

(1) Pursuant to a series of search warrants issued by the United States District Court for the Northern District of West Virginia, the defendant seized, possessed, and impounded a large quantity of the personal property which is the subject matter of this suit. The property consisted of automobiles, military trailers, trucks, electronic and radio equipment, military clothing, electric generating equipment, and other similar property. Each

of the search warrants stated that the "property was embezzled, stolen, purloined and converted from the said United States of America and then concealed and retained with intent to convert said [property] for personal use and gain, in violation of Title 18, Section 641, United States Code."

(2) Following the seizure of the property in 1967, two separate Federal actions were instituted against the plaintiff. The first, which was commenced in the Northern District of West Virginia, resulted in plaintiff's conviction on six counts of violating 18 U.S.C. § 2312 (interstate transportation of a stolen motor vehicle), one count of violating 18 U.S.C. § 2314 (transportation of stolen property in interstate commerce), and three counts of violating 18 U.S.C. § 641 (theft of Government property). The judgment and commitment order was entered on August 5, 1968. On appeal, the Fourth Circuit reversed the district court as to one count but affirmed plaintiff's conviction as to the remaining nine counts.

(3) On February 24, 1970, plaintiff's petition for a writ of certiorari from the Fourth Circuit to the Supreme Court was denied, 397 U.S. 907, and the petition for rehearing was denied on April 6, 1970, 390 U.S. 1030.

(4) On April 13, 1970, plaintiff filed a motion, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, for the return of his property. On May 29, 1970, the United States District Court for the Northern District of West Virginia denied the motion without prejudice to plaintiff's right to prosecute a civil action for the return of the property seized.

(5) The second criminal proceeding, commenced by indictment in the Eastern District of Virginia, was dismissed on July 9, 1970.

(6) As shown by the affidavit of the United States Attorney, who handled the criminal proceedings in West Virginia, it was the position of the Government at all times after the seizure of the property that it belonged to the United States and would not be returned to plaintiff. The United States Attorney wrote plaintiff on May 22, 1972, to the effect that if he could produce evidence of ownership of any items of the property, it would be returned to him. The letter further stated, however, that since plaintiff refused to provide any information which would support his claim to possession, the Government was taking appropriate measures to dispose of the property. Plaintiff's petition also alleges in Paragraph 8 that "The United States has exercised dominion and control of all the property set forth in the aforedescribed Warrants continuously from the respective dates of the seizures to the present." Although plaintiff has made unsupported statements to the contrary in his pleadings, the foregoing facts are taken as established and uncontroverted. *Royal Indemnity Co.* v. *United States*, 178 Ct. Cl. 46, 52, 371 F.2d 462, 465 (1967); *Hartwig* v. *United States*, 202 Ct. Cl. 801, 810-11, 485 F.2d 615, 620-21 (1973).

Defendant's motion for summary judgment is based on the ground that, since the alleged taking occurred not later than March 1967, plaintiff's petition became barred by the 6-year statute of limitations in 1973. *See* 28 U.S.C. §2501.

It is well settled that a cause of action for a Fifth Amendment taking accrues at the time the taking occurs, i.e., when the owner is deprived of the use and possession thereof. *Stafford Ordnance Corp.* v. *United States*, 123 Ct. Cl. 787, 793, 108 F. Supp. 378, 381 (1952); *Steel*

Improvement & Forge Co. v. *United States*, 174 Ct. Cl. 24, 29-30, 355 F.2d 627, 631 (1966).

In an effort to avoid the bar of the statutes of limitations, plaintiff first contends that his cause of action did not acrue until April 6, 1970, when the Supreme Court denied his motion for rehearing on his petition for a writ of certiorari. This contention is rejected on the ground that a determination of the lawfulness of the search warrants under Fourth Amendment standards has no bearing on the question of the ownership of the property. *See Warden* v. *Hayden*, 387, U.S. 294 (1967).

Plaintiff's second contention is that his cause of action accrued on May 29, 1970, when the district court denied his post trial motion, filed under Rule 41(e) of the Federal Rules of Criminal Procedure, for the return of his property. However, we find that a Rule 41(e) motion is designed to protect a defendant in a criminal case from the introduction into evidence of property which was wrongfully seized and that such a motion cannot be used as a post-conviction remedy for the return of the property. *See Bartlett* v. *United States*, 317 F.2d 71 (9th Cir.), *cert. denied*, 375 U.S. 847 (1963); *United States* v. *Butler*, 299 F. Supp. 778, 779 (D. Mass. 1969). As the district judge stated in his order of denial, plaintiff's proper remedy after conviction was a wholly independent civil action for the return of property he claims as his own.

Plaintiff next contends that his cause of action accrued on July 9, 1970, when the United States District Court for the Eastern District of Virginia dismissed the 31-count indictment against him. Alternatively, he says that the cause of action did not accrue until March 10, 1972. This was the date of the expiration of the 5-year statute

of limitations upon which further criminal indictments could be returned against him. We find these contentions to be without merit. In the first place, the expiration of the criminal statute of limitations merely acts as a bar to prosecutions under the criminal laws and has no effect on whether the property is "mere evidence" or "fruits of a crime." Moreover, we have repeatedly held that the pendency of criminal proceedings, and even imprisonment, is not a legal disability which extends the time for filing suit in this court beyond the period specified in 28 U.S.C. §2501. *See Grisham* v. *United States*, 183 Ct. Cl. 657, 664, 392 F.2d 980, 984, *cert. denied*, 393 U.S. 843 (1968); *Jackson* v. *United States*, 179 Ct. Cl. 29, 36, *cert. denied*, 389 U.S. 985 (1967); *O'Callahan* v. *United States*, 196 Ct. Cl. 556, 563, 451 F.2d 1390, 1393 (1971).

In view of the foregoing, the court concludes, as a matter of law, that plaintiff's suit is barred by the statute of limitations. IT IS THEREFORE ORDERED that defendant's motion for summary judgment is granted, and plaintiff's petition is dismissed.

By The Court

WILSON COWEN
Chief Judge

IN THE UNITED STATES COURT OF CLAIMS

No. 2-75

WOODROW YOKUM

v.

THE UNITED STATES

Before COWEN, *Chief Judge*, SKELTON and BENNETT, *Judges*.

ORDER

This case comes before the court on plaintiff's motion, filed December 22, 1975, pursuant to Rule 151, for, a rehearing or in the alternative to set aside the order of the court of November 21, 1975, and for further relief as set forth therein. Upon consideration thereof, together with the opposition and reply thereto, without oral argument,

IT IS ORDERED that plaintiffs' said motion filed December 22, 1975, be and the same is denied.

By The Court

WILSON COWEN
Chief Judge

APPENDIX B

United States Department of Justice

UNITED STATES ATTORNEY
NORTHERN DISTRICT OF WEST VIRGINIA
POST OFFICE BOX 591
WHEELING, WEST VIRGINIA 26003

September 29, 1971

Mr. Bonn Brown
Attorney at Law
48½ Randolph Ave.
Elkins, W. Va. 26241

Dear Mr. Brown:

In regard to our telephone conference of this date, I understand that you will interview Mr. and Mrs. Woodrow Yokum sometime this week concerning the property acquired by the Federal Government during the prosecution of Mr. Yokum. I further understand that you will advise me by letter relative to any claims the Yokums may have to said property.

I shall await your response in this regard.

Very truly yours,
PAUL C. CAMILLETTI
United States Attorney

By: .....
JAMES F. COMPANION
Assistant United States Attorney

cc: Mr. Milford L. Gibson
Attorney at Law
221 Davis Avenue
Elkins, West Virginia 26241

United States Department of Justice

UNITED STATES ATTORNEY
NORTHERN DISTRICT OF WEST VIRGINIA
POST OFFICE BOX 591
WHEELING, WEST VIRGINIA 26003

May 22, 1972

Mr. Bonn Brown
Attorney at Law
B. Wees Building
48½ Randolph Ave.
Elkins, W. Va. 26241

Re: Property claim of Woodrow Yokum

Dear Mr. Brown:

This is to acknowledge your letter dated April 18, 1972, regarding the above matter wherein you stated that you and Mr. Yokum no longer desire to negotiate a settlement of the claims to the property seized from Mr. Yokum.

This office has the duty to return the property to the party or parties rightfully entitled to possession. Since Mr. Yokum refuses to provide information which would support his claim to possession, we are taking appropriate measures to properly and appropriately dispose of all of the subject property.

From the time of seizure to the present, all of said property has been impounded and preserved pending the outcome of the criminal proceedings and prior efforts to resolve the property dispute. Effective with the date of this letter, please be advised that said property will be released from storage and accordingly disposed of in whatever manner is most appropriate and suitable as regards each item of property.

Since some of the subject property is located on the Yokum farm, I hereby request permission from your client in writing to permit the United States Marshal to enter upon his land for the sole purpose of removing said property.

Very truly yours,

PAUL C. CAMILLETTI
United States Attorney

By: _____
JAMES F. COMPANION
Assistant United States Attorney

cc: Mr. Richard W. Cardot
Attorney at Law
Talbott Building Suite 3
221-222 Davis Avenue
Elkins, West Virginia 26241

cc: Mr. Milford L. Gibson
Attorney at Law
221 Davis Avenue
Elkins, West Virginia 26241

cc: Mr. Woodrow Yokum
Beverly, W. Va. 26253

United States Department of Justice

UNITED STATES ATTORNEY
NORTHERN DISTRICT OF WEST VIRGINIA
POST OFFICE BOX 591
WHEELING, WEST VIRGINIA 26003

March 29, 1972

Mr. Richard W. Cardot
Attorney at Law
Talbott Building
Suite 3
221-222 Davis Avenue
Elkins, West Virginia 26241

Re: Property claim of Woodrow Yokum

Dear Mr. Cardot:

In follow-up to our telephone conference of March 21, 1972, I have enclosed three lists of property which pertain to Items numbered 1, 2 and 6 of your letter dated February 17, 1972. As I indicated to you by phone, the Government did not seize and has no record of the property referred to in Items 3, 4 and 5 of said letter.

For the purpose of clarification, I shall again repeat the Government's position in regard to the seizure of the Yokum property. We feel that the Government had probable cause to seize said property as evidence in the criminal prosecution against Mr. Yokum and, therefore, none of said property need be returned. Nevertheless, out of courtesy to Mr. Yokum and in an effort to settle all claims to said property, we are willing to return those items of property to which Mr. Yokum can demonstrate a clear and recognizable right of possession.

I again state that the Government does not intend to assume any liability for the vandalism which you described in your letters of February 17, 1972, and March 20, 1972. Furthermore the Government does not recognize any liability for rent claim by Mr. Yokum.

In an effort to resolve our differences, the Government desires to settle Mr. Yokum's property claims on an item by item basis. In general, we propose to compare any evidence, material or information which you would care to provide in support of Mr. Yokum's claims against the Government's claim to each item of property. Following this comparison and subsequent negotiations, we hope that both sides can agree to the disposition of said property and to the settlement of all claims to same.

After you review the enclosed materials, I hope that we can meet once again for further conference. I am available on short notice to confer with you in my Wheeling office and can confer with you in my Elkins office at a mutually convenient time. I look forward to hearing from you in this regard.

Very truly yours,

PAUL C. CAMILLETTI
United States Attorney

By: .....

JAMES F. COMPANION
Assistant United States Attorney

Enclosure

cc: Mr. Woodrow Yokum
Beverley, W. Va. 26253

Mr. Milford L. Gibson
Attorney at Law
221 Davis Avenue
Elkins, W. Va. 26241

Mr. Bonn Brown
Attorney at Law
48½ Randolph Avenue
Elkins, W. Va. 26241

February 14, 1973

Mr. James F. Companion
United States Attorney
Northern District of West Virginia
Post Office Box 591
Wheling, West Virginia 26003

Re: Property Claim of Woodrow Yokum

Dear Jim:

Confirming our telephone conversations of February 13th and 14th, I will plan to meet you at the U. S. Government warehouse in Point Pleasant on March 2, 1973. Mr. Yokum will accompany me.

My understanding of this trip is to give all of us an opportunity to inspect and inventory the property which the Government is still holding pursuant to the February and March 1967 search warrants. Following our inspection, we will supply you with a letter or other acceptable form of evidence indicating that neither the Civil Air Patrol or the State Road Commission of West Virginia is making any claim for the property in question. I understand that following our inspection and upon submission

of proof of no interest in a claim by either of the above agencies, the property will be returned to Mr. Yokum.

If I have misunderstood our conversations in any way, please advise me at your earliest convenience.

As I indicated in our phone conversation, I will telephone you at your home on the evening of March 1st to firm up plans on exactly when and where to meet the next day.

I look forward to our next meeting and a speedy resolution of this matter.

Very truly your,

LESLIE SCHERR

LS:rld

cc: Bonn Brown
Richard Cardot
Woodrow Yokum

United States Department of Justice

UNITED STATES ATTORNEY
NORTHERN DISTRICT OF WEST VIRGINIA
POST OFFICE BOX 591
WHEELING, WEST VIRGINIA 26003

February 17, 1973

Mr. Leslie Scherr
Attorney at Law
888 Seventh Street, N. W.
Washington, D. C. 20006

Re: Property claim of Woodrow Yokum

Dear Mr. Scherr:

This is to acknowledge your letter dated February 14, 1973, relative to the property claim of Woodrow Yokum.

I believe there may be a misunderstanding concerning what proof is necessary to satisfy the government that Mr. Yokum is entitled to the possession of property acquired in the names of the State Road Commission and the Civil Air Patrol. As I recall, I believe that I advised you at our December 7 meeting in your office that the SCR and the CAP have already provided me with letters indicating that they have no claim to the property in question. For your information, copies of these letters are enclosed.

The documents which you supplied me for the most part indicate that Mr. Yokum acquired the various items of property as the agent of the SRC and CAP for and on behalf of the SRC and CAP. Since it appears that this property belongs to the SRC and the CAP and yet these two agencies acknowledge no claim or right to this property, the government must see what evidence or authority you have that gives Mr. Yokum the right to claim these items of property for his personal use.

The above remarks pertain only to the items acquired in the names of the SRC and the CAP. I understand that Mr. Yokum claims to have acquired other property from Davis and Elkins College; however, these particular items of property have never been clearly identified for the government. Perhaps Mr. Yokum would be able to specify the D & E property upon viewing same at the Point Pleasant warehouse.

I would appreciate hearing from you further in regard to the above.

Very truly your,

JAMES F. COMPANION
United States Attorney

Encl.

cc: Bonn Brown
Richard Cardot
Woodrow Yokum

AFFIDAVIT

Before the undersigned authority came Bonn Brown, who, after being duly sworn, deposes and says:

I was an attorney engaged in private practice in Elkins, West Virginia, from June of 1934 and was retained as co-counsel for Woodrow Yokum from a period shortly after his property was seized by the United States Government in February or early March of 1967 and served in that capacity until December of 1972 when I retired from the case and Mr. Richard W. Cardot took over same. Mr. Cardot had been in the case prior to this time. In representing Mr. Yokum I actively participated in all pre-trial motions, conferences, the arraignment, trial, post-trial motions, and appeal to the Fourth Circuit Court of Appeals and the application for a writ of certiorari before the United States Supreme Court. I was present during all the Court proceedings involving Mr. Yokum including the motion that was heard before the United States District Court for the Northern District of West Virginia on May 29, 1970.

My trial notes reflect that on November 7, 1967, we filed a motion for the return of Mr. Yokum's property and that on March 4, 1968, Mr. Gibson and I argued a motion to suppress the evidence to quash the search warrants and the indictment, as well as our motion to return the property not mentioned in the indictments. At that time the Court allowed the government to file an answer resisting our request for the return of the property. This

answer by the Government was not filed until May 16, 1968, when we argued this motion. Mr. John Kamlowsky, United States Attorney, advised counsel at that hearing that all of the property seized would be retained for use as evidence in further investigations and proceedings in other jurisdictions. As stated both to the Court and to ourselves as attorneys and to Mr. Yokum the Government was retaining the property to be used as evidence.

On April 15, 1968, additional pre-trial motions were argued before the Court. At that time it was called to the Court's attention that a substantial portion of the material held by the Government was not Government property and was material and equipment that the defendant has purchased from private sources including Davis & Elkins College, Don Bosco School, West Virginia Civil Air Patrol, and other sources. We were again advised that all of this material was held for evidentiary purposes and the Court did not directly pass upon our motion for return of property that was in excess of that mentioned in the indictment.

The trial of this case was held on May 20 through May 30, 1968, and on June 24, 1968, the motion for a new trial and other matters were argued before the Court and overruled by the Court. On August 5, 1968, a commitment order was entered against Mr. Yokum. Following this an appeal to the United States Fourth District Court of Appeals was taken and part of the conviction was affirmed and a one count indictment was reversed and after this an application for writ of certiorari was filed in the United States Supreme Court which was denied sometime early in 1970. On April 13, 1970, a motion was filed on behalf of Mr. Yokum, seeking a reduction of the sentence and for probation only. This was not a Rule 41 E Motion and the prayer of the motion sought

only relief on the matter of the reduction of sentence. I was present when this was argued in Clarksburg and at no time was there any mention made of the return of the property. I did not know until after this matter had gone into the Court of Claims that there was an Order entered on May 29, 1970, denying Mr. Yokum's request for the return of the property. At the hearing in Clarksburg the Court did indicate that it would not enter an order returning any property because he wanted to study the matter further. My files do not reveal a copy of this order nor do I recollect or recall ever receiving the same. I discussed this matter with Mr. Gibson and his memory is the same.

In the criminal proceedings in Virginia, it was filed after the West Virginia indictments and related to some of the property that had been seized in the West Virginia jurisdiction. After Mr. Yokum was incarcerated on the West Virginia conviction the Virginia indictments were dismissed upon the United States Attorney's Office in that jurisdiction reviewing the transcript of the testimony of John H. Hall, Property Utilization and Disposal Officer at Cameron Station. Mr. Hall in the West Virginia case testified that the property involved in those indictments was properly and legally obtained by Mr. Yokum and that the said Federal Government had no claim or rights to this property.

It was my express understanding that the United States Government's contention that the property involved in the West Virginia case was held as evidence in this case against Yokum and that in other cases involving surplus property that at that time were under investigation by the Federal authorities including a case in Norfolk, Virginia, and one in Texas. Never to my knowledge was it mentioned by the government nor any agent for it that the

government was claiming possession for any other purposes than its possible use for evidentiary purposes. Some of the letters that went back and forth between James Companion and myself and Mr. Cardot clearly show that at all times this property was held for evidentiary purposes and never at any time did the government claim any ownership or right to keep the same. In fact this matter was never raised by the government in all of the discussions that we had with Mr. Companion or Mr. Kamlowsky. In fact the contrary was always stated and at the time the government moved this property to Point Pleasant, West Virginia, for storage a question was raised as to the adequacy of the facility there and the Federal Officials advised us that it could be better handled and taken care of at that location; and at that time there was no claim of ownership made by the Government. At one time Judge Maxwell, who presided in this case, stated that the property would be retained by the Government and kept in as good a condition as it was at the time it was seized and indicated that he had had an order to that effect. The Government did not obtain an order of confiscation nor apply for one nor did it indicate that it had any property rights during all the time that I was associated with the case.

The first time that this matter ever was brought up by the Federal Government was after we had had a conference in Elkins, Mr. Cardot and myself, with Mr. Companion, then Assistant United States Attorney, who met with us in the Federal Building along with a Mr. Connelly, an FBI agent.

At no time did I ever discuss the matter with Mr. Cammilletti who became the United States Attorney in the later part of 1969 and continued up until after I got out of the case in 1972. My only discussions with this

case involved originally Mr. Kamlowsky and then Mr. Companion.

The property involved in this seizure in addition to that which Mr. Yokum was indicted was large amounts of equipment and machinery that was never owned by the Federal Government but which was taken in a sweeping seizure of the property by the Federal Officials. They recognized by indentification marks on the boxes shown on the return of the search warrant that certain of the properties was identified as coming from sources other than the Government. Unfortunately many of the items taken were not inventoried but were seized and retained without inquiry as to their ownership. The government up to 1973 recognized that most of the property belonged to Mr. Yokum or his assigns and that at no time during all of the hearings and proceedings in 1967 up through the time that I was in the case did they ever make any claim of ownership for the property. It certainly would seem strange that if it was not being held for anything other than evidentiary use as indicated in the letters and statements that they could now claim that it belonged to them and that Mr. Yokum had to assert a claim back in 1967 if he was to regain the property or if he was to have any right to damages for loss of the property. At all times when the matter was before the District Court we were advised that nothing could be done until the matter had been disposed of either by investigation or trial of that particular case. We did everything possible to protect the rights of Mr. Yokum. It is impossible to say that in 1967 we could have gone into Court and obtained a release of this property in any civil proceeding because it was clear that the Government had no intention of releasing the evidence until after they had completed their investigation as to surplus

property and there would have been no way that Mr. Yokum could have obtained any civil relief prior to the time. When we were negotiating with Mr. Companion for its release in 1972 and 1973 it seems exceedingly strange that there is now being an attempt made to indicate that the government has a right to hold property and prevent your reclaiming it while the Statute of Limitations being run particularly when when the result of the property that was being retained for evidentiary use was always indicated according to the record in the case and letters of the Assistant United States Attorney or any Orders that may have been entered in this matter.

BONN BROWN

STATE OF WEST VIRGINIA,

COUNTY OF RANDOLPH, TO-WIT:

MR. BONN BROWN, named in the foregoing and hereto annexed Affidavit, having been first duly sworn, says that the facts and allegations therein contained are true, except insofar as they are therein stated to be upon information, and insofar as they are therein stated to be upon information, he believes them to be true.

BONN BROWN

Taken, subscribed and sworn to before me this the 17th day of December, 1975.

My Commission expires June 26, 1983.

SHIRLEY J. KITTLE,
Notary Public

AFFIDAVIT

STATE OF WEST VIRGINIA,

COUNTY OF KANAWHA, TO WIT:

Before the undersigned authority this day came MILFORD L. GIBSON, who, after being duly sworn, deposes and says:

I was an attorney engaged in private practice in Elkins, West Virginia, from January 1, 1954, and was retained as co-counsel for Woodrow Yokum from a time shortly after his property was seized by the United States Government in 1967 and served in that capacity until July 27, 1971, when I was appointed a Commissioner of the West Virginia Public Service Commission. In representing Mr. Yokum I actively participated in all pre-trial motions, the arraignment, trial, post trial motions, an appeal to the Fourth Circuit Court of Appeals, and the application for a writ of certiorari before the United States Supreme Court. I was present during all court proceedings involving Mr. Yokum with the exception of a motion that was heard before the United States District Court for the Northern District of West Virginia on April 13, 1970.

My trial notes reflect that on November 1, 1967, I filed a motion for return of Yokum's property, that on March 4, 1968, we argued a motion to suppress the evidence, to quash the search warrants and the indictment, as well as our motion to return the property not mentioned in the indictments. At that time the Court allowed the Government time to file its answer resisting our request for the return of property and this pleading was filed on May 16, 1968. On the date of March 4, 1968, the United States Attorney advised counsel at that hearing that all property seized would be retained for use as evidence in further

investigations and proceedings involving surplus property matters in other jurisdictions and that the Government was retaining the property to be used as evidence.

On April 15, 1968, additional pre-trial motions were argued before the Court. At that time it was called to the Court's attention that a substantial portion of the material held by the Government was not Government property and was material and equipment that the defendant had purchased from private sources. Again we were advised that all of this material was held for evidentiary purposes and the Court did not directly pass upon our motion for return of property in excess of that mentioned in the indictment.

The trial of this case was held on May 20 through 30, 1968, and on June 24, 1968, a motion for a new trial and so forth was argued and overruled by the Court. On August 5, 1968, a commitment order was entered against Mr. Yokum. On April 13, 1970, a motion was filed on behalf of Mr. Yokum, seeking a reduction of sentence only. This was not a Rule 41E motion and the prayer of the motion sought only relief on the matter of reduction of sentence. I was not present at this hearing and although an order was entered on May 29, 1970, denying Yokum's request for return of property my files do not reflect a copy of this order nor do I recollect receiving the same.

In the criminal proceedings in Virginia, it was apparently filed after the West Virginia indictments and related to some of the property that had been seized in the West Virginia jurisdiction. After Yokum was incarcerated, the Virginia indictments were dismissed upon the United States Attorney's office in that jurisdiction reviewing the transcript of the testimony of John H. Hall,

Property Utilization and Disposal Officer at Cameron Station. Mr. Hall in the West Virginia case testified that the property involved in those indictments was properly and legally obtained by Yokum.

It was my understanding of the Government's contention that all of this property was being held as evidence in the case against Yokum and in other cases involving surplus property that were at that time under investigation by Federal authorities. Never to my knowledge was it mentioned that the Government was claiming possession for any other reason than its possible use for evidentiary purposes. At the time the Government moved this property to Point Pleasant, West Virginia, for storage a question was raised as to the adequacy of the facility there and the Federal officials advised us that it would be better cared for at that location, and at that time there was no claim of ownership made by the Government. It did not obtain an order of confiscation nor apply for one nor indicate that it had any property rights during the time I was associated with the case.

The property involved in this seizure consisted in addition to that for which Mr. Yokum was indicted in large amounts of equipment and machinery that was never owned by the Government but which was obtained in a sweeping seizure of his property by the Federal officials. Many of these items so taken were not inventoried but were seized and retained without inquiry as to their ownership.

MILFORD L. GIBSON

Taken, subscribed and sworn to before me, a Notary Public in and for said County and State, and certified

under my hand and official seal this 11th day of December, 1975.

My Commission expires September 4, 1980.

MARY REED STARCHER
Notary Public

APPENDIX C

AFFIDAVIT

I, STEPHEN MARTIN, a resident of Elkins, Randolph County, West Virginia, desire to make the following statement or affidavit.

That between the year 1932 and 1965, I was employed by Davis and Elkins College of Elkins, Randolph County, West Virginia, in the capacity of Superintendent of Buildings and Grounds. That, to the best of my knowledge and belief, approximately in the fall of 1954, Dr. Raymond Purdom, President of Davis and Elkins College and Mr. Phil Williams, a member of the Board of Directors and Trustees of Davis and Elkins College, informed me that Mr. Woodrow Yokum had purchased some surplus property belonging to Davis and Elkins College.

That Mr. Phil Williams instructed me that Mr. Yokum had purchased this property from Davis and Elkins College. I personally observed Mr. Yokum and some of the employees from Davis and Elkins College, moving the surplus equipment from the floor of the old Science Hall to one of Mr. Yokum's trucks. This truck made many trips back and forth from the College, apparently to Mr. Yokum's home in Beverly. There was surplus equipment not only located on the third floor of the old Science Hall, but also in the basement of Hallihurst, and also in an army Quonset Hut on the Football Field. To the best of my knowledge, this other equipment located in these other buildings was also purchased by Mr. Yokum from the College.

The surplus equipment purchased by Mr. Yokum from the Davis and Elkins College consisted of, to the best of my knowledge and memory, certain electronic equip-

ment, radio equipment, motors, generators, power distribution equipment, phone equipment, cable, etc. Some of this surplus equipment were in paper boxes, wooden crates, some uncrated, some of the boxes had the name Davis and Elkins stamped on the boxes.

I have not been compensated nor have I been promised any compensation from anyone for making this statement, and this statement is given by me freely and voulntarily.

STEPHEN MARTIN

STATE OF WEST VIRGINIA,
COUNTY OF RANDOLPH, TO-WIT:

Stephen A. Martin, the person named in the foregoing and hereto annexed affidavit having been first duly sworn, says that the facts and allegations therein contained are true, except insofar as they are therein stated to be upon information, and insofar as they are therein stated to be upon information, he believes them to be true.

STEPHEN A. MARTIN

Taken, subscribed and sworn to before me on this the 12 day of December, 1975.

My commission expires March 17, 1980.

RICHARD W. CARDOT
Notary Public

CERTIFICATE OF TITLE TO A VEHICLE

The Department of Motor Vehicles of West Virginia certifies that pursuant to an application under oath and in substance prescribed by the laws of West Virginia and filed with said Department, the applicant, whose name and address first hereinbelow appear, has been registered in the office of said Department as the lawful owner of the vehicle hereinafter described, or is otherwise entitled to have said vehicle registered in the name of said applicant, that is to say:

	MAKE BODY	YEAR MODEL	SERIAL NUMBER	WEIGHT CAPACITY	TITLE NUMBER
63	INT DM	53	2786	36000	B955447 5-19-64

YOKUM, WOODROW
MAIN ST
BEVERLY W VA RAN CO

Said Department further certifies that from said verified application it appears the above described vehicle is subject to the lien and encumbrance described below, and none other, that is to say:

Name and Mail Address of Lien Holder — Description of Lien

_____ Date _____

_____ Amount _____

_____ Kind _____

This lien fully paid, satisfied, and released this

____day of _____ ,19____ _____
(Name of Corporate Releasor)

_____ By _____
(Signature of Individual Releasor) (Officer's Signature) (Officer's Title)

Acknowledged before the subscriber by _____ this ____ day of ____ 19____.
(Name of Individual Releasor)

(In Case of Corporate Release, Complete the Acknowledgment Below)

Acknowledged before the subscriber by _____ ,who signed the name of
(Name of Officer of Corporate Releasor)

_____ , a corporation, thereto this ___ day of _____ , 19 ___

My notarial commission will expire

_____
Notary Public

(SEAL) Witness the corporate name of the Department of Motor Vehicles of West Virginia and the seal of said Department the day and year set beneath the name of the applicant in this Certificate.

DEPARTMENT OF MOTOR VEHICLES

CERTIFICATE OF TITLE TO A VEHICLE

The Department of Motor Vehicles of West Virginia certifies that pursuant to an application under oath and in substance prescribed by the laws of West Virginia and filed with said Department, the applicant, whose name and address first hereinbelow appear, has been registered in the office of said Department as the lawful owner of the vehicle hereinafter described, or is otherwise entitled to have said vehicle registered in the name of said applicant, that is to say:

	MAKE	BODY	YEAR MODEL	SERIAL NUMBER	WEIGHT CAPACITY	TITLE NUMBER
03	INT TK		51	3583	36000	B955121 4-21-64

YOKUM, WOODROW
MAIN ST
BEVERLY W VA RAN CO

Said Department further certifies that from said verified application it appears the above described vehicle is subject to the lien and encumbrance described below, and none other, that is to say:

Name and Mail Address of Lien Holder Description of Lien

_____ Date _____

_____ Amount _____

_____ Kind _____

This lien fully paid, satisfied, and released this

___ day of _____ ,19___ _____
(Name of Corporate Releasor)

_____ By _____
(Signature of Individual Releasor) (Officer's Signature) (Officer's Title)

Acknowledged before the subscriber by _____ this ___ day of ____ 19___.
(Name of Individual Releasor)

(In Case of Corporate Release, Complete the Acknowledgment Below)

Acknowledged before the subscriber by _____, who signed the name of
(Name of Officer of Corporate Releasor)

_____, a corporation, thereto this ___ day of _____, 19 ___

My notarial commission will expire

_____
Notary Public

(SEAL) Witness the corporate name of the Department of Motor Vehicles of West Virginia and the seal of said Department the day and year set beneath the name of the applicant in this Certificate.

DEPARTMENT OF MOTOR VEHICLES

CERTIFICATE OF TITLE TO A VEHICLE

The Department of Motor Vehicles of West Virginia certifies that pursuant to an application under oath and in substance prescribed by the laws of West Virginia and filed with said Department, the applicant, whose name and address first hereinbelow appear, has been registered in the office of said Department as the lawful owner of the vehicle hereinafter described, or is otherwise entitled to have said vehicle registered in the name of said applicant, that is to say:

	MAKE	BODY	YEAR MODEL	SERIAL NUMBER	WEIGHT CAPACITY	TITLE NUMBER
99	D L SE		52	8700		CI94337 11-19-65

YOKUM, WOODROW
MAIN ST
BEVERLY RAN W VA 26253

Said Department further certifies that from said verified application it appears the above described vehicle is subject to the lien and encumbrance described below, and none other, that is to say:

Name and Mail Address of Lien Holder Description of Lien

_____ Date _____

_____ Amount _____

_____ Kind _____

This lien fully paid, satisfied, and released this

___ day of _____ ,19 ___ _____
(Name of Corporate Releasor)

_____ By _____
(Signature of Individual Releasor) (Officer's Signature) (Officer's Title)

Acknowledged before the subscriber by _____ this ___ day of ____ 19___.
(Name of Individual Releasor)

(In Case of Corporate Release, Complete the Acknowledgment Below)

Acknowledged before the subscriber by _____, who signed the name of
(Name of Officer of Corporate Releasor)

_____, a corporation, thereto this ___ day of _____, 19 ___

My notarial commission will expire

_____
Notary Public

(SEAL) Witness the corporate name of the Department of Motor Vehicles of West Virginia and the seal of said Department the day and year set beneath the name of the applicant in this Certificate.

DEPARTMENT OF MOTOR VEHICLES

CERTIFICATE OF TITLE TO A VEHICLE

The Department of Motor Vehicles of West Virginia certifies that pursuant to an application under oath and in substance prescribed by the laws of West Virginia and filed with said Department, the applicant, whose name and address first hereinbelow appear, has been registered in the office of said Department as the lawful owner of the vehicle hereinafter described, or is otherwise entitled to have said vehicle registered in the name of said applicant, that is to say:

MAKE	BODY	YEAR MODEL	SERIAL NUMBER	WEIGHT CAPACITY	TITLE NUMBER
DDD	TK	56	82848061	8000	B566079 4-23-85

YOKUM, WOODROW
MAIN ST
BEVERLY RAN W VA 26253

Said Department further certifies that from said verified application it appears the above described vehicle is subject to the lien and encumbrance described below, and none other, that is to say:

Name and Mail Address of Lien Holder Description of Lien

_____ Date _____

_____ Amount _____

_____ Kind _____

This lien fully paid, satisfied, and released this

____day of _____ ,19____ _____
(Name of Corporate Releasor)

_____ By _____
(Signature of Individual Releasor) (Officer's Signature) (Officer's Title)

Acknowledged before the subscriber by _____ this ____ day of ____ 19____.
(Name of Individual Releasor)

(In Case of Corporate Release, Complete the Acknowledgment Below)

Acknowledged before the subscriber by _____, who signed the name of
(Name of Officer of Corporate Releasor)

_____, a corporation, thereto this ____day of _____, 19____

My notarial commission will expire

_____
Notary Public

(SEAL) Witness the corporate name of the Department of Motor Vehicles of West Virginia and the seal of said Department the day and year set beneath the name of the applicant in this Certificate.

DEPARTMENT OF MOTOR VEHICLES

Supreme Court, U. S.
FILED
JUN 10 1976
MICHAEL RODAK, JR., CLERK

No. 75-1557

In the Supreme Court of the United States

OCTOBER TERM, 1975

WOODROW YOKUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1557

WOODROW YOKUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the Court of Claims' holding that the statute of limitations (28 U.S.C. 2501) barred his suit to recover the reasonable value of property that the federal government took from him.

1. During February and March of 1967 the government seized a quantity of personal property from petitioner. It has exercised dominion and control of the property since that time (Pet. App. 3a).[1] All of the property was seized pursuant to search warrants, which stated that the "property was embezzled, stolen, purloined and converted from the said United States of America and then concealed and retained with intent to convert said [property] for personal use and gain * * *" (*id.* at 2a).

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[1]The property consisted of automobiles, military trailers, trucks, electronic and radio equipment, military clothing, electric generating equipment, and other similar property (Pet. App. 1a).

Petitioner was convicted of crimes growing out of appropriation of federal property.[2] After the convictions became final, he filed a motion in the United States District Court for the Northern District of West Virginia for the return of the property, pursuant to Fed. R. Crim. P. 41(e). On May 29, 1970, the district court denied the motion. On January 2, 1975, almost five years after the denial of the Rule 41(e) motion and eight years after the seizure, petitioner brought this suit in the Court of Claims. The Court of Claims held that petitioner's action was barred by the six-year statute of limitations (Pet. App. 1a-5a).

2. The decision below is correct. There is no conflict among the circuits and no reason for review by this Court.

As the Court of Claims held (Pet. App. 3a-4a):

> It is well settled that a cause of action for a Fifth Amendment taking accrues at the time the taking occurs, i.e., when the owner is deprived of the use and possession thereof. *Stafford Ordinance Corp.* v. *United States,* 123 Ct. Cl. 787, 793, 108 F. Supp. 378, 381 (1952); *Steel Improvement & Forge Co.* v. *United States,* 174 Ct. Cl. 24, 29-30, 355 F.2d 627, 631 (1966).

See also *United States* v. *Dickinson,* 331 U.S. 745; *United States* v. *422,978 Square Feet of Land,* 445 F.2d 1180

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[2]Petitioner, the former Highway Supervisor for the West Virginia State Road Commission, was convicted on six counts of violating 18 U.S.C. 2312 (interstate transportation of stolen motor vehicles), one count of violating 18 U.S.C. 2314 (transportation of stolen property in interstate commerce), and two counts of violating 18 U.S.C. 641 (theft of government property). *United States* v. *Yokum,* 417 F. 2d 253 (C.A. 4), certiorari denied, 397 U.S. 907, rehearing denied, 397 U.S. 1030. Petitioner also was indicted on 31 counts in Virginia. That indictment was dismissed on July 9, 1970, after his West Virginia convictions became final.

(C.A. 9). In this case, petitioner's own pleadings state that the taking occurred in February and March of 1967, when the property was seized, and that "[t]he United States has exercised dominion and control of all the property * * * from the respective dates of the seizures to the present" (Pet. App. 3a).

In an effort to avoid the bar of the statute of limitations, petitioner contends that his cause of action did not accrue until April 6, 1970, when this Court denied his motion for rehearing on his petition for a writ of certiorari. This contention was properly rejected by the Court of Claims "on the ground that a determination of the lawfulness of the search warrants under Fourth Amendment standards has no bearing on the question of the ownership of the property. See *Warden* v. *Hayden,* 387 U.S. 294 (1967)" (Pet. App. 4a). The other dates suggested by petitioner for the accrual of his cause of action (Pet. 6) similarly have no relationship to the question whether petitioner is the owner of the property in question, and hence do not bear on the limitations period.[3]

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.

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[3]There is nothing to petitioner's position that the government promised to return the property between 1971 and 1973 and that these promises tolled the statute of limitations (Pet. 9-10). The record shows that there were no new promises which would toll the statute of limitations. The "promises" upon which petitioner relies are nothing more than statements that the United States would return the property if petitioner could establish that he was its lawful owner. See, *e.g.,* Pet. App. 8a, 10a. Because the officials in question believed then (and still believe) that the property in question had been stolen from the government, they did not unconditionally promise to return it to petitioner.

Supreme Court, U. S.
FILED
JUL 1 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1557

WOODROW YOKUM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PLAINTIFF'S REPLY MEMORANDUM

RICHARD W. CARDOT
LAW OFFICES OF CARDOT & KENT
Attorneys at Law
P. O. Box 266
Elkins, West Virginia 26241
Counsel for Petitioner

Of Counsel:

F. TROWBRIDGE VOM BAUR
VOM BAUR, COBURN, SIMMONS & TURTLE
1700 K Street, N.W.
Washington, D C. 20006

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1557

WOODROW YOKUM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PLAINTIFF'S REPLY MEMORANDUM

---

1. Section 1. of the Memorandum of the United States in Opposition is seriously misleading. It at least conveys the impression that petitioner was convicted of crimes growing out of the appropriation of the very federal property involved in this action. Moreover, on page 3,

respondent makes the amazing assertion that "the officials in question believed then (and still believe) that the property in question had been stolen from the government". Apart from the fact that no criminal prosecution was ever brought with respect to that property, there is nothing in the record to support this defamatory and gratuitous statement.

2. Respondent has made no answer to one of our major points, that mere seizure of property, pursuant to a search warrant, for use as evidence in a criminal prosecution does not divest the owner of title. Specifically, petitioner's property was seized as "evidence" for temporary use in a criminal proceeding, but, strangely enough, was never used in any criminal proceedings; respondent may retain property seized for use as evidence until the contemplated criminal proceeding terminates, at which time, and only then, respondent becomes under a duty to return the property; and the Statute of Limitations does not begin to run during such temporary use and before the duty to return arises. Petition, Pages 6, 8.

We know of no answer to this point that respondent can make.

3. While some of the promises by respondent's officials to return the property were conditional, others were not. Petition, Pages 4, 5. But even the conditional promises were sufficient. They were flatly inconsistent with any claim of right and so tolled the Statute of Limitations.

4. The Court below has so widely departed from the established principles controlling the running of the Statute of Limitations as to warrant this Court's power of

supervision. We submit that the Court should summarily reverse the decision below.

RICHARD W. CARDOT
LAW OFFICES OF CARDOT & KENT
Attorneys at Law
P. O. Box 266
Elkins, West Virginia 26241

Counsel for Petitioner

Of Counsel:

F. TROWBRIDGE VOM BAUR
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Washington, D C. 20006